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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

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PIK-PIT

No. 285

S. ELBERT PIKE, ERNEST C. PIKE, CHARLES T. PIKE, CO-PARTNERS TRADING AS W. S. PIKE, SEEDSMAN, THE GLOBE SEED COMPANY, THE BEST GARDENS, AND MIDDLE WEST SUPPLY COMPANY,
Petitioners,

vs.

FRANK C. WALKER, (SUBSTITUTED FOR JAMES A. FARLEY) AS POSTMASTER GENERAL OF THE UNITED STATES; CALVIN W. HASSELL, ACTING SOLICITOR POST OFFICE DEPARTMENT; THOMAS J. MURRAY, ASSISTANT SOLICITOR, POST OFFICE DEPARTMENT; AND PETER J. CONNALLY, ATTORNEY, POST OFFICE DEPARTMENT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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No. .....

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Petitioners,

vs.

FRANK C. WALKER, (SUBSTITUTED FOR JAMES A. FARLEY) AS POSTMASTER GENERAL OF THE UNITED STATES; CALVIN W. HASSELL, ACTING SOLICITOR POST OFFICE DEPARTMENT; THOMAS J. MURRAY, ASSISTANT SOLICITOR, POST OFFICE DEPARTMENT; AND PETER J. CONNALLY, ATTORNEY, POST OFFICE DEPARTMENT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, S. Elbert Pike, Ernest C. Pike and Charles T. Pike, co-partners, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia affirming a final decree

of the District Court of the United States for the District of Columbia dismissing the complaint brought by the petitioners for declaratory judgment coupled with a prayer for injunctive relief, against the enforcement of a so-called fraud order issued by representatives of the Post Office Department against petitioners' trade names, on charges that under such names petitioners were engaged in conducting through the United States mails a scheme or device for obtaining money or property by means of false or fraudulent pretenses, representations or promises in violation of Sections 3929 and 4041 Revised Statutes of the United States as amended (Title 39 U. S. C. A. Sections 259 and 732). The opinion of the District Court appears in the printed record beginning at page 67. Findings of fact and conclusions of law of the District Court appear in the printed record beginning at page 68.

The United States Court of Appeals for the District of Columbia on March 17, 1941, in affirming the decision of the District Court, rendered an opinion which appears in the printed record beginning at page 77 and is reported in ..... F. (2d) .....

A petition for rehearing, which was denied by the United States Court of Appeals for the District of Columbia on April 22, 1941, appears in the printed record beginning at page 81.

It is sought to review the decision of the United States Court of Appeals for the District of Columbia.

Statement of the Case.

Petitioners, S. Elbert Pike, Ernest C. Pike, and Charles T. Pike, are brothers and co-partners trading as S. W. Pike, Seedsman; The Globe Seed Company; The Best Gardens, and Middle West Supply Company. Their principal address and place of business is at St. Charles in the

State of Illinois. The petitioners' business of growing seeds, bulbs and plants has been in continuous operation for fifty-two years, having originally been established in 1887 by S. W. Pike, the father of petitioners, who died in 1933. His sons (petitioners herein) who had previously been associated in the business of their father, succeeded to the ownership of the business upon their father's death (R. 47). The principal method in distributing petitioners' horticultural products is by mail (R. 47). It was conceded by the respondents and by the Trial Court (R. 48-49) that the fraud order complained of definitely puts petitioners out of the mail order business and that irreparable injury and damage resulted. The business conducted in the name of the Middle West Supply Company, a side-line venture selling face powder by mail, and designed to take up the seasonal slack in the horticultural business, was discontinued in 1938, months prior to the Post Office citation (R. 48).

The evidence adduced at the trial on the issues joined by petitioners' complaint and defendants' answer, definitely established that the facts and circumstances attendant upon the issuance of the fraud order complained of (and which are not disputed) are as follows:

Petitioners were ordered by an attorney in the Post Office Department to appear on March 13, 1939, before the Solicitor of the Post Office Department and show cause why a fraud order should not be issued against petitioners' concerns, The Best Gardens and Middle West Supply Company.

Petitioners appeared with their counsel at the time stated before Thomas J. Murray, another attorney of the Post Office Department, and a so-called hearing was convened. The Department's memorandum of charges was amended at that time to include the names Globe Seed Company and S. W. Pike, Seedsman. Testimony was taken

on behalf of both parties, comprising 677 typewritten pages, and hundreds of exhibits were introduced.

Some time after the close of the proceedings before Murray, Peter J. Connally, also an attorney in the office of the Solicitor, who presented and argued the case for the Department before Murray, read the transcript of record and made excerpts therefrom for the assistance of the Solicitor and the Postmaster General, and made some corrections of typographical errors (R. 35). Connally also prepared a proposed finding of fact (R. 36). Connally likewise discussed the case *ex parte* with Murray, the Hearing Officer (R. 37). The proposed finding of fact was then submitted, shortly before the issuance of the fraud order (R. 38), to defendant Calvin W. Hassell, Assistant Solicitor, who testified that he examined the record, read the briefs[1] for counsel on opposing sides, directed some changes to be made in the proposed finding of fact, and signed same (R. 41). No copy was furnished the respondents or their counsel (R. 41). Hassell testified that the exhibits in the case were so voluminous that they were not brought to his office (R. 41). The finding of fact and recommendation that a fraud order issue, as signed by Hassell on October 27, 1939, was then given to a messenger and by him taken to the Chief Clerk of the Post Office Department, who in turn transmitted the papers to the Postmaster General's office (R. 41). On the following day, Saturday, October 28, 1939, the Postmaster General satisfied himself that the finding of fact and recommendation for the issuance of the fraud order was properly signed by the Acting Solicitor for the Post Office Department, and he then glanced at several pages of the finding of fact and recommendation, and thereby acquainted himself with the nature of the scheme, and thereupon signed

1. While no brief was filed by Connally on behalf of the Government (R. 36), it is possible that his proposed finding of fact was considered a brief.

and issued the fraud order (R. 50-51). The fraud order had been previously prepared by Hassell (R. 41).

The fraud order recited that said order was issued "upon evidence satisfactory to him"—the Postmaster General (R. 7).

At no time did the Postmaster General hear any of the evidence, and by his admission, (R. 51), all he knew about the case was gleaned from a glance through several pages of the finding of fact and recommendation signed by Hassell, but prepared in substance by Connally. Having neither read nor heard the evidence, the Postmaster General did not consider and appraise same in issuing his so-called fraud order. Likewise, since he did not read or consider the answer of respondents, the evidence adduced in their behalf, or their argument and brief, he had no knowledge as to their contentions.

The above statement of facts is substantially in accord with the findings of fact made by the Trial Court below (R. 69-71), and the factual resume contained in the opinion of the appellate court (R. 78).

On March 21, 1940, a final decree was entered by the Trial Court dismissing plaintiffs' complaint.

The Court below, in its opinion (R. 79), discussed at length the limitations imposed by the First and Fifth Amendments to the Constitution of the United States on the power of the Postmaster General in such cases and declined to subscribe to, as being too farreaching, the proposition urged by the Postmaster General and accepted by the Trial Court, that the action of the Postmaster General in issuing a fraud order is ministerial and not judicial, and therefore not involved with the application of accepted standards of due process of law as established by this Court. The Appellate Court in declining to decide the constitutional question, relied upon the failure of peti-

tioners to include the testimony taken before the Post Office Department attorney, in the record on appeal, contending that there must be some showing that there is at least a reasonable doubt upon the merits, to warrant a Court in taking action against an invasion of petitioners' constitutional rights.

Questions Involved.

1. Did the procedure followed by the Post Office Department in the issuance of a fraud order against petitioners constitute a full and fair hearing satisfying due process of law?

2. Is such action by the Post Office Department purely ministerial or is it quasi-judicial in nature?

3. Does the absence of a specific provision for a hearing in the statute, exempt the Post Office Department from applying judicial standards of fair play in a fraud order proceeding?

4. As a condition precedent to raising a constitutional question as to an invasion of a citizen's rights to due process of law, is it necessary to establish that there is a reasonable doubt in the citizen's favor on the merits?

Reasons for Granting Writ.

This case involves several substantial and important Federal questions: (1) as to the application of the constitutional guarantee of the due process of law, to the procedure of the Post Office Department under Sections 3929 and 4041 Revised Statutes (Title 39 U. S. C. Sections 259 and 732); (2) as to the usurpation of limitless power by an administrative officer in a plenary action, in defiance of constitutional restrictions; and (3) as to the right of a citizen to relief in the Federal Courts from oppressive plenary

administrative orders issued without due process of law, in cases where the merits of the controversy are not presented.

The United States Court of Appeals for the District of Columbia in this case has decided an important question of Federal law in a decision which petitioners contend is untenable and contrary to the weight of authority and applicable decisions of this Court. The decision directly affects the large and important mail order industry, with an investment of many millions of dollars in property and equipment, employing hundreds of thousands of people.

It is the contention, therefore, of petitioners, that the questions here presented should be finally settled and determined on a review of the decision by this Honorable Court, as a matter of pubilc interest for the guidance of both the industry affected and the petitioners, as well as for the guidance of the Federal Government and the States.

For the reasons above outlined, your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia in this cause, commanding that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record of the proceedings in the case numbered and titled on its docket No. 7697 S. Elbert Pike, *et al,* Appellants, v. Frank C. Walker as Postmaster General, *et al,* Appellees, and that the judgment of the Court below be reversed by this Court, and that your petitioners have such other and further relief in the premises as to this Court may seem just.

Respectfully submitted,

HORACE J. DONNELLY, JR.,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

PRELIMINARY MATTERS.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia may be found in the record at pages 77 to 80. It is reported in ..... F. (2d) at page .....

Statement of the Case.

The principal facts have been summarized in the petition *supra,* pages 2 to 5 and are succinctly stated in the opinion of the Court below (R. 79).

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Title 28 U. S. C. A. Section 347a.

Statutes Involved.

Sections 3929 and 4041, Revised Statutes as amended (Title 39 U. S. C. A. Sections 259 and 732)[2]; the Federal Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, Chapter 512; Judicial Code Section 274 D (Title 28 U. S. C. A. Section 400); and the due process clause of the Fifth Amendment of the Constitution of the United States.

2. Sec. 3929 is set forth in full in the appendix.

Specifications of Error.

The United States Court of Appeals for the District of Columbia erred as follows:

1. In affirming the decree of the District Court of the United States for the District of Columbia, dismissing petitioners' complaint.

2. In holding that a reasonable doubt on the merits must be shown by the plaintiff to justify the granting of equitable relief by a Court where due process of law is not accorded in an administrative proceeding of a quasi-judicial nature.

3. In denying petitioners' (appellants below) petition for a rehearing before the full bench of the Court, grounded upon the contention that since the original action was brought under the Federal Declaratory Judgment Act of 1934, the Court should have reversed the decision of the lower court dismissing the complaint and remanded the cause to the Trial Court with instruction to enter its judgment declaring that the action of the Postmaster General was violative of petitioners' constitutional right to due process of law.

4. In denying petitioners' petition for rehearing grounded upon the contention of petitioners that there is no authority or support in law for the Court's contention in effect (and upon which it apparently based its decision) that an alleged wrong-doer is foreclosed from relief in the Federal Courts against an invasion of his constitutional right to due process of law by an administrative agency of government.

ARGUMENT.

I.

The Power of the Postmaster General Under the So-called Fraud Order Statutes (39 U. S. C. A. Sections 259 and 732) Is Quasi-Judicial and Not Discretionary or Ministerial in Nature and Is Limited by the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

The United States Court of Appeals for the District of Columbia expressed the opinion, without applying same to the instant case, that the Postmaster General's authority under such statutes is governed by the Acts of Congress which confer it, and *by the law of the land* (R. 80). The Court in this connection cited the decision of this Honorable Court in *Burton* v. *United States,* 202 U. S. 344, 371; the dissent of Mr. Justice Brandeis in *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 430; and the dissent of Mr. Justice Holmes in *Leach* v. *Carlile,* 258 U. S. 138, 141, stating that "it would be going a long way therefor to say that in the management of the post office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution".

Apparently, in quoting the language of Justice Brandeis in the Burleson case that: "The function is a strictly judicial one", the United States Court of Appeals for the District of Columbia recognized that to be the applicable law of the case.

That other Federal Courts have recognized that the proceeding is quasi-judicial and not ministerial in nature is exemplified by numerous decisions. In *Peoples United*

States Bank v. *Gilson*, 161 Fed. 285, 290, Judge Sanborn of the Eighth Circuit Court of Appeals said:

> "But this authority, like that of every other executive office *upon whom quasi-judicial duty is conferred* by Act of Congress is neither unbounded, arbitrary, *nor discretionary*, and its exercise is governed by the Acts of Congress which confer it, and *by the law of the land*, and his violation or disregard of either is remedial in the Courts." (Emphasis supplied.)

Other cases in which it was directly or inferentially declared that a fair hearing is necessary and that the fraud order proceeding is quasi-judicial in nature, are as follows:

> Equity will not relieve against fraud order issued *after fair hearing* without mistake of law, on substantial evidence. *Aycock* v. *O'Brien*, 28 F. (2d) 817 (C. C. A. 9th, 1938).
>
> The order or ruling is at least *quasi-judicial in its nature*, required to be made upon evidence "satisfactory" to the Postmaster General, and has the effect of a judgment or decree denying to the citizen a *very substantial right* from which there is no appeal except to the Courts. *Bailey Gaunce Oil & Ref. Co.* v. *Duncan*, 10 F. Supp. 280 (D. C. La. 1934).
>
> A citizen of the United States has a property right in the use of the mails for lawful purposes of which he cannot be deprived without due process of law. * * * It is the exercise not of an executive power by a *judicial* one for an executive officer to exclude a citizen from use of the mails. *Hoover* v. *McChesney*, 81 Fed. 472 (C. C. Ky. 1897).

The right to notice and hearing is imperative in judicial or quasi-judicial proceeding although hearing is not especially enjoined by satute, such right being constitutional. *Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring*, 89 F. (2d) 88; 67 App. D. C. 44. Reversed on other grounds, 302 U. S. 658.

Where the Postmaster General issues a fraud order without jurisdiction or by reason of an error of law and thereby stops the delivery of letters containing important enclo-

sures and refuses the payment of money orders, he violates the property rights of the person or company whose letters are thus withheld and who are payees of postal money orders. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *Peoples United States Bank* v. *Gilson,* 161 Fed. 286. Cf. *Lukens Steel Co.* v. *Perkins,* 107 F. (2d) 627, 70 App. D. C. 354; reversed on other grounds, 310 U. S. 113; *McLean Lumber Co.* v. *United States,* 237 Fed. 460, 465, and dissent of Mr. Justice Brandeis in *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 432.

An administrative proceeding resulting in an order confiscating property of the person affected is a proceeding of a quasi-judicial character. *Morgan* v. *United States,* 298 U. S. 468, 480; *Lukens Steel Co.* v. *Perkins* (*supra*). The power of Congress over the mails is not unlimited and is subject to the Bill of Rights. *Burton* v. *United States,* 202 U. S. 344, 371; *Securities and Exchange Commission* v. *Timetrust, Inc.,* 28 F. Supp. 24.

The phrase "due process of law" is synonymous with the phrase "according to the law of the land" and the due process of law clause governs any action whether through the legislative body, the Courts or through executive or administrative officers. *Fleenor* v. *Hammond,* 116 F. (2d) 982.

Inquisitorial powers vested by Congress in government bureaus and officials charged with duty of regulating business activities of citizens are subject to beneficent provisions of so-called Federal Bill of Rights in first ten Amendments to Federal Constitution, which cannot be impaired by Congress. *United States* v. *Goodner,* 35 F. Supp. 286.

Therefore, it can only follow that the principle laid down by this Court in *Morgan* v. *United States,* 298 U. S. 468, 480, that the one who decides must hear and the principle of the second Morgan case (*Morgan* v. *United States,* 304 U. S. 1, 18), that the requirements of fairness (in an ad-

ministrative proceeding of a quasi-judicial nature) are not exhausted in the taking or consideration of evidence but extend to the concluding part of the procedure as well as to the beginning and intermediate steps, applies with equal force to the proceeding in which a citizen is required to appear before the Solicitor of the Post Office Department and show cause why a fraud order should not be issued against him by the Postmaster General under the fraud order statutes.

Various Circuit Courts of Appeals in applying the doctrine of the Morgan cases, have held that the one who decides must hear or in the case of written testimony, *read* (*National Labor Relations Board* v. *Botany Worsted Mills*, 106 F. (2d) 263, 265—C. C. A. 3d), and that there is no legal basis for an order of an administrative board where those persons whose character and experience and attainments have been considered such as to warrant their appointment by the President and confirmation by the Senate, and to whom Congress has committed the ascertainment of the facts, do not ascertain them. (*National Labor Relations Board* v. *Cherry Cotton Mills*, 98 F. (2d) 444, 446—C. C. A. 5th).

This Court has also said in *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337, at page 357, that:

> "The whole scheme of the administrative proceeding presupposes hearings and determination in accordance with the demands of due process. *The Board* which makes its findings and renders its decision *must consider the evidence* and base its findings and decision upon it and until the contrary appears, we must assume that the Board will do so. *Morgan* v. *United States*, 298 U. S. 468." (Emphasis supplied)

Likewise in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, Mr. Justice Frankfurter of this Court said:

> "* * * the laws under which these agencies operate prescribe the fundamentals of fair play. They require

> that interested parties be afforded an opportunity for hearing and *that judgment must express a reasoned conclusion.*" (Emphasis supplied.)

In the instant case, as the Appellate Court stated in its opinion, the Postmaster General admitted that petitioners were not afforded an opportunity to see and have access to the findings of fact prepared by the active prosecutor and that he had not read or considered the testimony or heard argument or read petitioners' brief. Where then, is the "reasoned conclusion" leading to the judgment and how does such action comply with the language of the statute and the order itself—"upon *evidence* satisfactory to the Postmaster General"?

Although there is no dogmatic doctrine that directly requires that a copy of the findings of fact as such must be served upon respondents as a requisite for a fair hearing, yet it is apparent that the Hearing Officer's findings of fact should be furnished when the officer who issues the *final* order in such a proceeding neither hears the evidence or argument nor considers and appraises the evidence by reading the written testimony. The recognized method which has been approved by this Court and by various Circuit Courts of Appeals, of presenting the contentions of a respondent as to the evidence, or lack of evidence, to support a conclusion or contention of the administrative officer's subordinate who did hear the evidence, is by means of furnishing the respondent with a finding of fact. The purpose and propriety of a finding of fact or tentative examiner's report, is to not only acquaint the respondent with the conclusions and issues framed from the evidence, but to likewise give the respondent an opportunity to except to such findings and to point out any errors, inaccuracies and improprieties therein to the board, commission or officer vested with the power by statute to issue an order controlling the activities of others—thereby raising issues of fact and law on the evidence, so that the final authority

may have before it a summary of the points involved in the case, and can thereby render justice by carefully considering the points raised and appraise the evidence in connection with such points.

The cases in which the Courts have held that no formal findings of fact, as such, were necessary, all show that some other similar method was employed in getting the contentions and exceptions of a respondent before the administrative board or officials. *National Labor Relations Board* v. *Mackey Radio,* 304 U. S. 333; *In re National Labor Relations Board,* 304 U. S. 486; *National Labor Relations Board* v. *Cherry Cotton Mills,* 98 F. (2d) 444; *National Labor Relations Board* v. *Biles Coleman Lumber Co.,* 98 F. (2d) 18; *Cupples Mfg. Co.* v. *National Labor Relations Board,* 103 F. (2d) 953.

The reason for requiring procedural due process of law in this type of proceeding is best expressed by the language of this Court in *Powell* v. *Alabama,* 287 U. S. 45, 68, as follows:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions."

While the language of the opinion of the United States Court of Appeals for the District of Columbia indicates that the points of law raised on the appeal were decided upon the sole ground that a reasonable doubt upon the merits of the controversy before the Post Office Department should have been shown, yet the most reasonable and logical interpretation that can be placed upon the Court's

discussion of the constitutional question (which it declined to decide) is that due process of law is as applicable to the fraud order proceedings of the Post Office Department as it is to every other administrative proceeding of a quasi-judicial nature. Further, the Court in its discussion of this point indicated that the procedure followed in the instant case was not due process of law.

Therefore, if it can be conceded that the Court below was correct in its enunciation of the principles surrounding the constitutional issue, then there remains only one point to be considered, and that is that the Court erred in deciding, in effect, that the constitutional question cannot be considered unless accompanied by some showing of a reasonable doubt on the merits that petitioners were not wrongdoers. If such premise is a correct one, then the contention of the United States Court of Appeals for the District of Columbia on this point is in conflict with the decisions of other Circuit Courts of Appeal in other jurisdictions, and is contrary to the settled doctrine that an accused is entitled to a full and fair trial regardless of his guilt or innocence.

II.

Where Constitutional Rights to a Hearing Satisfying Due Process of Law Are Invaded, the Courts Are Bound to Consider the Constitution and Statutes as They Affect a Quasi-Judicial Order, and Touch the Manner of Its Making as Distinguished from Correctness of Its Conclusions.

It is the Court's power and duty to pursue an inquiry into the method of decision and to review all questions of jurisdiction and regularity of proceedings and all questions of constitutional right and statutory authority. *National Labor Relations Board* v. *Cupples Mfg. Co.*, 103 F. (2d) 953.

Jurisdictional facts are subject to judicial review although found by the board or agency. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47; *National Labor Relations Board* v. *Cherry Cotton Mills*, 98 F. (2d) 444; *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18.

If it can be said that quasi-judicial tribunals fall in the same category as judicial tribunals so far as the conduct of trials before them is concerned, the recent case of *Hansberry* v. *Lee*, 311 U. S. ..... ; 85 L. Ed. 11, 13 (advance opinions), throws some light on the subject. By substituting the words "quasi-judicial agency," for "Court" in the opinion, this Court's pertinent dicta might be paraphrased to read:

> "But when a judgment of a [quasi-judicial agency] is challenged for want of due process it becomes the duty of this Court to examine the course of procedure —to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as the requisites of the due process which the Constitution prescribe. *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 273."

Findings and orders of an administrative agency may be rejected by the Courts, because of errors in the procedure amounting to a denial to a fair hearing. *Arkansas Wholesale Grocers Assn.* v. *Federal Trade Commission*, 18 F. (2d) 866, (C. C. A. 8th) certiorari denied 275 U. S. 533.

In *Powhatan Mining Co.* v. *Ickes*, 118 F. (2d) 105, 110, the Circuit Court of Appeals for the 6th Circuit stated:

> "The fact that the directors' order might be justified on the merits does not obviate the requirement of a fair trial. *Inland Steel Co.* v. *National Labor Relations Board*, 7th Circuit, 109 F. (2d) 9, 20. The requirement of a fair trial is binding on administrative agencies as well as on Courts. *Morgan* v. *United States*, 304 U. S. 1, 14, 15; *Shields* v. *Utah, Idaho Central R. Co.*, 305 U. S. 177; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304.

In *National Labor Relations Board* v. *Prettyman,* 117 F. (2d) 786, 791, the Circuit Court of Appeals for the 6th Circuit, also on the authority of *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304, stated:

> "Even if the order of the Board were justified by the facts,—the necessity of according due process of law to the respondents is not obviated. No order is just if obtained without due process of law; otherwise the Board could enter orders without a hearing."

III.

The Federal Courts Are Required to Exercise Their General Equity Powers (Where There Is No Adequate Remedy at Law) to Prevent, and Their Statutory Powers to Declare, Against Irreparable Damage and Injury Resulting from Invasion of the Citizen's Constitutional Rights and Guarantee to Due Process of Law.

Under the Federal Rules of Civil Procedure, a complaint is sufficient if it sets forth facts which show the plaintiff is entitled to any relief which the Court can grant. Federal Rules of Civil Procedure, Rule 54 (c), 28 U. S. C. A. following Section 723C. *Keiser* v. *Walsh,* 118 F. (2d) 13, 14.

In the instant case the complaint (R. 2) stated that the action arose under the Federal Declaratory Judgment Act of 1934. The relief sought included a judgment (R. 5) declaring the rights of the plaintiffs to due process of law in the fraud order proceedings and secondarily for injunctive relief (R. 6).

The appellate court took the position in its opinion that "some prejudice must be shown to have resulted to appellants to justify us in issuing the writ of injunction" (R. 80) and that the appeal was without merit on the assumption that appellants were wrongdoers because they did not include the transcript of testimony before the Post Office Department in the record on appeal (R. 80).

Petitioners sought to point out the fallacy of such a contention in their petition for rehearing, which is set forth in full in the printed record beginning at page 81, because the appellate court had apparently grounded its decision on an obscure technical point that was never considered by the parties or the Trial Court—overlooking completely the real issues of the case. In the light of the nature of the action (for declaratory judgment) substantial justice could have been done by an unequivocable decision under the Declaratory Judgment Act,—where no question of "exercise of discretion" or "issuing the writ of injunction" would have arisen. If the Post Office Department procedure did not accord petitioners due process of law, a declaratory judgment to that effect would have been sufficient as determinative of the rights of the parties. If the Postmaster General then ignored such a declaration in favor of the plaintiffs, the same could then be enforced by injunctive relief under the Court's right to enforce its judgment.

Where a plaintiff, though in a position to sue for executory or coercive decree, contents himself with milder declaration of rights as adequate to his purposes, declaratory judgment is available because plaintiff is content with mere declaration for which Declaratory Judgment Act provides, even though he may have a coercive judgment or decree by asking for it. *Stephenson* v. *Equitable Life Assurance Society*, 92 F. (2d) 406 (C. C. A. 4th).

On the other hand, even if the form of the action were ignored completely, the facts set forth in the petitioners' complaint and established by the uncontradicted proof, standing alone, should have been sufficient to warrant the exercise of the Federal Court's equity powers. Both irreparable injury and inadequacy of remedy at law were alleged and conceded (R. 48). Why then, if petitioners' constitutional rights to due process of law were invaded and their property taken from them as a result of the fraud

order action, are they not entitled to the greatest relief a Federal Court could give them? If equitable relief were not available in such cases, the citizen deprived of his liberty or property without a hearing could afterwards not be heard to complain because the government prosecutor, acting under the guise of some statute enacted by Congress, has charged and *ex parte* found him guilty of some offense under the statute. If such conditions were permitted to exist, every citizen charged with some act of wrongdoing by an agency of the government in cases where no statutory right of appeal existed, would find the doors of equity closed to him for relief from irreparable injury and damage, merely because he has been charged with wrongdoing, whether justly or unjustly. (See discussion and cases cited in petition for rehearing (R. 87).)

It has been held by this Court that the proper method to secure a review of the Postmaster General's fraud order is by suit in equity for injunctive relief. *Degges* v. *Hitchcock*, 229 U. S. 162.

If it should appear that in a particular statute no adequate provision has been made for judicial review, writ of injunction is perhaps the only proper available remedy. *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 101 F. (2d) 426, aff'd. 306 U. S. 56.

Equitable jurisdiction of a suit which presents one ground for equitable relief, with no adequate remedy at law, extends to the disposition of all the questions raised by the bill since a court of equity does not do justice by halves, and will prevent, if possible, a multiplicity of suits. *Shaffer* v. *Carter*, 252 U. S. 37.

Exemption of government from suit does not protect officers of government from personal liability to persons whose rights of property they have invaded and does not preclude equity from restraining such invasion. *Jamestown Veneer & Plywood Corp.* v. *National Labor Relations Board*, 13 F. Supp. 405.

Conclusion.

The issues involved in this case present an important question as to whether procedural standards of due process of law apply to a fraud order proceeding of the Post Office Department. The question has never been so definitely and unequivocably presented as it is in the instant case and until this Honorable Court establishes the law on the point, the large and important mail order industry can be subjected to unreasonable and unwarranted interference by Post Office Department officials without limitation. All business firms and individuals using the mails in the course and conduct of their business and personal relationships could be deprived of the important mail privilege without restriction and without hearings in complete disregard of their constitutional rights and guarantees.

It is therefore respectfully submitted that the cause is manifestly one calling for the exercise by this Honorable Court of its supervisory power and that to such end, a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia.

HORACE J. DONNELLY, JR.,
Counsel for Petitioners.

APPENDIX.

Mail of persons conducting lotteries or fraudulent schemes returned; evidence of agency. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself. (R. S. § 3929; Sept. 19, 1890, c. 908, § 2, 26 Stat. 466; Mar. 2, 1895, c. 191, § 4, 28 Stat. 964.)

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407004—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 285

S. ELBERT PIKE, ERNEST C. PIKE, CHARLES T. PIKE, CO-PARTNERS TRADING AS W. S. PIKE, SEEDSMAN, THE GLOBE SEED COMPANY, THE BEST GARDENS, AND MIDDLE WEST SUPPLY COMPANY, PETITIONERS

v.

FRANK C. WALKER (SUBSTITUTED FOR JAMES A. FARLEY), AS POSTMASTER GENERAL OF THE UNITED STATES; CALVIN W. HASSELL, ACTING SOLICITOR, POST OFFICE DEPARTMENT; THOMAS J. MURRAY, ASSISTANT SOLICITOR, POST OFFICE DEPARTMENT; AND PETER J. CONNOLLY, ATTORNEY, POST OFFICE DEPARTMENT

ON PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 77–80) is not yet reported. The opinion, findings of fact,

and conclusions of law of the District Court are set forth in the record at pp. 67–71.

JURISDICTION

The judgment of the Court of Appeals was entered March 17, 1941 (R. 81) and motion for rehearing was denied April 22, 1941 (R. 89). Petition for writ of certiorari was filed July 19, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Following a hearing presided over by a trial examiner of the Post Office Department for which adequate notice had been given and at which evidence was adduced on behalf of both sides, a report containing a summary of the evidence, findings of fact and recommendation for the issuance of a fraud order against the petitioners was submitted to the Postmaster General. Petitioners were not served with the proposed findings and thus were unable to present exceptions thereto. The evidence being satisfactory to him upon a consideration of the report, the Postmaster General issued a fraud order. The question here presented is whether petitioners were accorded a full and fair hearing.

STATUTES INVOLVED

The pertinent portions of R. S. 3929, as amended (39 U. S. C., Sec. 259), are as follows:

> The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, * * *.

The pertinent portions of R. S. 4041, as amended (39 U. S. C. Sec. 732), are as follows:

> The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor; * * * and

> may provide by regulation for the return to the remitters of the sums named in such money orders. * * *

STATEMENT

This is a suit to enjoin the enforcement of a fraud order issued by the Postmaster General on October 28, 1939, and for a declaratory judgment (R. 1–7). Petitioners do not question the sufficiency of the evidence to support the Postmaster General's findings[1] but assail his order on the ground that the procedure followed deprived them of their constitutional rights.

For many years prior to October 28, 1939, the individual petitioners, under the trade names W. S. Pike, Seedsman, the Globe Seed Company, and The Best Gardens, engaged in selling by mail from St. Charles, Illinois, seeds, plants, and bulbs to customers throughout the country, and under the trade name Middle West Supply Company, sold face powder and other cosmetics in the same manner (R. 27, 47, 48, 49). On January 31, 1939, the Solicitor of the Post Office Department issued a citation together with a memorandum of charges commanding petitioners to show cause on March 13, 1939, why a fraud order should not be issued against them pursuant to Sections 3929 and 4041 of the Revised Statutes as amended, 39 U. S. C. Secs. 259, 732 (R. 54–57). A hearing was had be-

[1] The District Court found the fraud order to be supported by substantial evidence (R. 70).

fore Thomas J. Murray, an attorney in the office of the Solicitor, and evidence was presented on behalf of the Post Office Department and petitioners (R. 34–35, 41, 69). At the conclusion of the hearing on March 18, 1939 (R. 44), counsel for both sides argued orally and petitioners thereafter submitted a brief (R. 35–36, 41, 69). After Murray had considered the evidence and petitioners' brief, he directed Connolly, the attorney who represented the Department, to prepare a rough draft of a memorandum to the Postmaster General which included proposed findings of fact and a recommendation for the signature of the Acting Solicitor, Calvin W. Hassell, that a fraud order issue (R. 35–37, 40). Murray made certain changes in Connolly's draft and transmitted it to Hassell (R. 37, 39). Hassell read the transcript of the testimony and the brief submitted on behalf of the petitioners, directed that some changes be made in the memorandum and when this was done signed it (R. 41). The memorandum was then forwarded to the Postmaster General, who glanced through several pages of the findings of fact and recommendation and acquainted himself with the nature of the scheme. He thereupon signed and issued the fraud order (R. 50–51), which had been prepared by Hassell (R. 41) and in which it is recited that the order was issued upon evidence satisfactory to the Postmaster General (R. 7).

No copy of the memorandum was served upon petitioners prior to the issuance of the fraud

order nor were they accorded an opportunity to appear and argue before the Postmaster General. This was in accordance with the usual practice in fraud order cases (R. 39–40)[2] and petitioners did not request a copy of the findings and recommendation of the Acting Solicitor prior to the issuance of the fraud order (R. 39, 42–44).

The district court dismissed the complaint (R. 71) and the court below affirmed.

ARGUMENT

It is unnecessary to consider the question much discussed below,[3] whether the procedure utilized by the Postmaster General in the administration of the postal system is limited, to the same extent as in regulatory agencies, by the First and Fifth Amendments. It is also unnecessary to consider the ruling of the court below (R. 80)

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[2] See Monograph of the Attorney General's Committee on Administrative Procedure dealing with the Post Office Department, S. Doc. No. 186, 76th Cong., 3d Sess., pp. 18–32.

[3] The Court of Appeals expressly declined to accept as the basis for its decision the Government's contentions that fraud orders may be issued without notice or hearing and that their issuance is a purely executive function. The court said that these contentions were "too far reaching to be admitted until specifically recognized and declared by the Supreme Court" (R. 80). But compare, *In re Rapier*, 143 U. S. 110; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407; *Leach* v. *Carlile*, 258 U. S. 138; *Warren* v. *United States*, 183 Fed. 718 (C. C. A. 8th); *Hall* v. *Willcox*, 225 Fed. 333 (S. D. N. Y.); *Elliott Works* v. *Frisk*, 58 F. (2d) 820 (S. D. Ia.). However, the court went on to hold that it was unnecessary to dispose of these contentions definitively upon the record before it.

that, at least where the respondent had notice and hearing, prejudice on the merits must appear before an injunction will issue.

Petitioners' entire argument is predicated upon the contentions that they were denied due process because (1) they were not served with a copy of the Acting Solicitor's memorandum nor given an opportunity to object to the findings prior to the issuance of the fraud order, and (2) the hearing was rendered unfair because the order of the Postmaster General was not based upon independent findings made by him or upon any evidence produced before him.

The same contentions were urged in the petitions for certiorari filed in this Court in *Plapao Laboratories, Inc.* v. *Farley,* 92 F. (2d) 228 (App. D. C.), certiorari denied, 302 U. S. 732;[4] *National Conference on Legalizing Lotteries, Inc.* v. *Farley,* 96 F. (2d) 861 (App. D. C.), certiorari denied, 305 U. S. 624, and *Simmons* v. *Farley,* 99 F. (2d) 343 (App. D. C.), certiorari denied, 305 U. S. 651, in all of which exactly the same procedure was followed. The issues were fully discussed in the Government's briefs in opposition to the granting of writs of certiorari. Since the petitions in these cases were denied by this Court, it would seem unnecessary to reargue those points here.[5]

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[4] In the *Plapao* case only the second of petitioner's contentions was presented, but both issues were urged in the other two cases.

[5] While the record would have permitted an additional argument to be made by petitioner, that the proceeding was un-

CONCLUSION

The petition for writ of certiorari presents no issue not previously raised in this Court, and there is no conflict of decisions. Therefore, we respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
KEITH BROWN,
Attorneys.

AUGUST 1941.

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fair because of the participation of the prosecuting attorney in the preparation of the findings and recommendation of the Solicitor, this contention is not made in the petition and apparently was not urged below (see R. 4–5, 73).

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. 285.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

S. ELBERT PIKE, ET AL., *Petitioners.*

v.

FRANK C. WALKER, (Substituted for James A. Farley, as Postmaster General of the United States), et al., *Respondents.*

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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v.

FRANK C. WALKER, (Substituted for James A. Farley, as Postmaster General of the United States), et al., *Respondents.*

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court:

Under date of October 13th, 1941, this Court entered its order denying petitioners' application for a writ of certiorari.

Petitioners now petition the Court for a rehearing, and for reasons therefor state that on a rehearing they are prepared to show that:

1. The action of this Court, in denying the application for writ of certiorari, leaves the principal questions presented, finally unsettled as a matter of vital Federal law.[1]

[1] The United States Court of Appeals for the District of Columbia in its opinion stated that it could not accept the proposition urged by the Postmaster General and accepted by the Court below as being too far-reaching to be admitted until specifically recognized and declared by this Court, thereby, in effect, inviting this Court to pass upon the question for the guidance of litigants in similar cases in the future.

2. The decision of this Court by leaving the decision of the Appellate Court unchanged and unclarified, in effect nullifies the decision of this Court in *Crowell* v. *Benson*, 285 U. S. 22, wherein it was held that a Court in reviewing an order issued by an administrative agency having quasi-judicial status, is not limited to an ascertainment as to whether there was substantial evidence to support the order, but should also consider jurisdictional and constitutional questions and facts when same are properly raised and presented.

3. The denial by this Court of the application for certiorari leaves the large and substantial mail order business in general, and your petitioners' business in particular, open to control and destruction by prosecuting administrators in disregard of the principles of administrative due process of law, as established by this Court in *Morgan* v. *United States*, 298 U. S. 468, and *Morgan* v. *United States*, 304 U. S. 1, respectively.

4. The decision of this Court in denying petitioners' application for certiorari has the effect of establishing as entirely new and unprecedented law, the opinion of the United States Court of Appeals for the District of Columbia, to the effect that a citizen alleged to be a wrongdoer has no right to complain of, and secure relief against, the deprivation of his property without due process of law.

5. A definite decision on the Constitutional question by this Court is in the public interest, in view of the growing administrative and legislative tendency to relegate individual rights into the background under the excuse of administrative convenience and expediency.

ARGUMENT.

1. Is the rule laid down in Crowell v. Benson, 285 U. S. 22, that jurisdictional and constitutional questions and facts must be considered de novo by the reviewing Court, when properly raised, no longer the law of the land?

Petitioners submit that this Court, in denying the application for certiorari, has in effect permitted the rejection of the doctrine of *Crowell* v. *Benson* by the United States Court of Appeals for the District of Columbia. In the instant case, petitioners' application succinctly set forth, and the record so established, that the Appellate Court declined to apply the principles of due process of law (which it had correctly enunciated in its opinion) on the ground that petitioners were not entitled to consideration upon the constitutional point because they had not presented to the Appellate Court the transcript of evidence taken before the Post Office Department upon which the fraud order was allegedly based, and that therefore in the absence of such transcript of evidence, the Appellate Court was compelled to accept the conclusion of the lower Court that there was substantial evidence to support the order and that petitioners were therefore wrong-doers not entitled to relief. The law is thus left unsettled and petitioners are left without redress from a deprivation of their property without due process of law as a result of the fraud order proceedings.

Crowell v. *Benson* (*supra*) established the precedent that a Federal Court called upon to review the quasi-judicial order of an administrative tribunal should consider *de novo* Constitutional and jurisdictional facts if properly raised. This Court even went so far, on pages 49 and 50 of its opinion, to refer to the exercise by this Court of its jurisdiction to deny affect to any administrative finding which is without evidence—or where the hearing is "inadequate" or "unfair" or arbitrary in any respect. Citing *Interstate Commerce Commission* v. *Louisville N. R. Co.*, 227 U. S.

91, 92; *Tagg Bros. and Moorehead* v. *United States,* 280 U. S. 442. The Court further said at page 60:

> "*In cases brought to enforce Constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions both of fact and law,* necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This Court has held that the owner should be entitled to 'a fair opportunity for submitting that issue to its judicial tribunal for determination upon its own independent judgment as to both law and facts.'" Citing Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287; Pendergast v. New York Telephone Company, 262 U. S. 43, 50; Tagg Bros. and Moorhead v. United States, 280 U. S. 420; Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 600. (Emphasis supplied).

Four years subsequent to the Crowell decision, this Court ordered trial *de novo* for "Constitutional fact" in *St. Josephs Stockyards Company* v. *United States,* 298 U. S. 38. In no case has this principle of law been overruled or limited. Trials *de novo* have been granted in three cases by this Court, following the rule expressed in the *Crowell* case. *Borax Consolidated, Ltd.,* v. *Los Angeles,* 296 U. S. 10, 18 (1935) (review of jurisdiction of United States Land Office); *United States* v. *Idaho,* 298 U. S. 105 (1936) (review of Interstate Commerce Commission); and *Baltimore & O. R. R.* v. *United States,* 298 U. S. 349 (1936) (review of Interstate Commerce Commission).

The doctrine of the *Crowell* case has been followed at least seven times in other Federal Courts. *Green* v. *Crowell,* 69 F. (2d) 762, (C. C. A. 5th 1934); *Metropolitan Casualty Insurance Company* v. *Hoague,* 72 F. (2d) 175, (App. D. C. 1934); *Denver Union Stockyards Company* v. *United States,* 57 F. (2d) 735, (D. C. Colo. 1932); *Wichita Gas Company* v. *Public Service Commission,* 2 F. Supp. 792 (D. C. Kansas 1933); *Appalachian Electric Power Company* v. *Smith,*

4 F. Supp. 6, (D. C. Virginia 1933); *United States* v. *International Trading Corp.*, 20 F. Supp. 357, (D. C. N. Y. 1937); *Metropolitan Sand and Gravel Corp.* v. *Lowe*, 22 F. Supp. 65 (D. C. N. Y. 1938). The Circuit Court of Appeals for the First Circuit even extended it to a consideration of the Johnson Act. *Munoz* v. *Porto Rico Ry. Light and Power Company*, 83 F. (2d) 262, (C. C. A. 1st 1936).

While *Crowell* v. *Benson* was not referred to by the Court, yet the Third Circuit Court of Appeals in *Berkshire Employees Ass'n.* v. *National Labor Relations Board*, 121 F. (2d) 235, recently remanded the case to the Administrative Agency with instructions to take additional evidence on the Constitutional fact alleged by the Employer, that he did not have a hearing before an impartial tribunal. Is a decision by a partial and biased judge any more of a deprivation of due process than a judgment entered by a judge who neither heard nor read nor in any way considered the evidence?

Other cases, and other utterances of the Judges deciding the instant case, are inconsistent with the entire premise that a decision on a Constitutional question when properly raised is dependent upon a showing that evidence on the merits must also be presented. Mr. Chief Justice Groner who wrote the opinion for the Court of Appeals in the instant case, expressed his views on the general subject in his letter to the Attorney General of the United States accompanying the report of the Committee on Administrative Procedure (Administrative Procedure in Government Agencies, Senate Document No. 8, 77th Congress First Session) at page 248, wherein he stated as follows:

> "What I advocate is as basic as the *universally conceded right* of every individual to claim the equal protection of the law whenever he receives an injury and the constant duty of the government to afford that protection. * * * Second, assuming this complete separation of the functions of prosecutor and judge in administrative procedure, the findings of fact of the administrative officer or tribunal making an order or

> adjudication if supported by substantial evidence should be conclusive in any judicial review *except where a Constitutional right or privilege is in issue.*" (Emphasis supplied).

Justice Groner in his report went on to refer to "that which is *the fundamental right* of the citizen to have—an open, fair and unbiased determination of his rights when charged by the government with violation of regulatory statutes."

That the Court of Appeals rejected the doctrine in *Crowell* v. *Benson* is indicated by the language of the opinion (R. 80) wherein it is stated:

> "* * * if the proof of guilt here had been such as to which reasonable men might differ, the irregularity in the administrative proceeding, if there was irregularity, would have presented the case in a different aspect and made necessary a decision on the Constitutional question as to which we express no opinion."

In other words, the Court very definitely rejected the principles of the *Crowell* case in favor of some other unprecedented reasoning that an alleged wrong-doer has no standing under the Constitution. That this position is entirely contrary to other contemporaneous legal reasoning by the same Court is exemplified by the *per curiam* opinion of the same Court delivered just three weeks previous to the decision in the instant case, in *Whitaker* v. *McLean,* 118 F. (2d) 596, —— D. C. App. ——, decided February 24, 1941, on which the Chief Justice also sat. In the opinion in the *Whitaker* case, this language is expressive:

> "A right to be tried by a Judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If before a case is over a Judge's bias appears to have become overbearing, we think it disqualifies him. It follows that the judgment must be reversed. *It is more regrettable because it is our impression based on an examination of the record that the claim on which the plaintiff sued was probably without merit.*" (Emphasis supplied).

In the *Whitaker* case, the Court says that a fair trial must be afforded a litigant and reverses an adverse decision against that litigant even though it appears to them, that there is no merit in the litigant's case. In the instant case three weeks later, the same Court says that an alleged wrong-doer who does not bring up the voluminous transcript of testimony taken before the Post Office Department but who relies entirely upon the fact that such evidence played no part in the final judgment with the resulting invasion of Constitutional rights through not being afforded a fair trial—may not have that question considered.

Is the formalistic presentation of a costly printed (at the time) record (even one disclosing a lack of merit to the cause of action) the lodestar which guides a decision upholding the right to a fair trial in one case, and denies the same right in another—where no record is presented? The position is inconsistent, for due process of law—the right to a fair, unbiased trial and a judgment representing a reasonable conclusion on evidence—is still due process of law whether in a lower court or before an administrative body where there is little to distinguish the presiding officer from the prosecutor. If anything, the inclination should be toward the stricter application of judicial standards to a quasi-judicial proceeding where the active participants are subordinate employees rather than persons qualified by their experience and background to be appointed by the President, with the approval of the Senate, to judicial positions.

The attitude expressed in the opinion of the United States Court of Appeals for the District of Columbia to the effect that the conclusion of the Trial Judge (that the fraud order was supported by substantial evidence[2]) in

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[2] Such a conclusion places the Trial Court in the position of considering and passing *de novo* upon evidence which was not considered by the Postmaster General. The generalization of the conclusion and the Trial Court's failure to elaborate or to make any specific finding or statement as to such evidence (as he did on the Constitutional point), indicates that such "evidence" played no part in the decision.

effect, because of the failure to bring up on appeal the record of the testimony before the Post Office Department, is a foreclosure of petitioners' right to have the Constitutional due process of law points decided, is further inconsistent with, and contrary to, the Appellate Court's own ruling in the *Whitaker* v. *McLean* case; is contrary to the public utterances of the Chief Justice who wrote the opinion in the instant case; and is in direct conflict with the rule of law laid down by this Court in *Crowell* v. *Benson, (supra)*, which has been upheld and applied in the many cases cited hereinbefore.

A further generalization that could be made in connection with the application of the doctrine of Constitutional right to fraud order actions of the Post Office Department, is the doctrine established by this Court in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, wherein it was held that a fraud order issued by the Postmaster General "by reason of an error of law", violates the property rights of the person whose mail is thus withheld. When considered in the light of the "substantial evidence" rule and the "upon evidence satisfactory to the Postmaster General" prescription of the fraud order statutes[3], the failure of that officer to consider the evidence amounts to an error of law, since he has not based his decision and order on evidence.

Petitioners submit that this is the first clear-cut case on this proposition that has reached the Federal Courts. The fraud order cases set forth in respondents' brief[4] in which certiorari to the United States Court of Appeals for the District of Columbia has been denied by this Court, are readily distinguishable from the instant case on the facts

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[3] Sections 3929 and 4041 Revised Statutes as amended (Title 39 U. S. C. A. Sections 259 and 732).

[4] *Plapao Laboratories, Inc.* v. *Farley*, 92 F. (2d) 228 (App. D. C.), certiorari denied, 302 U. S. 732; *National Conference on Legalizing Lotteries, Inc.* v. *Farley*, 96 F. (2d) 861 (App. D. C.), certiorari denied, 305 U. S. 624, and *Simmons* v. *Farley*, 99 F. (2d) 343 (App. D. C.), certiorari denied, 305 U. S. 651.

alone, for in none of the cases cited was it shown: (1) that the Postmaster General did not consider the evidence; (2) that the active prosecutor guided and to all intents and purposes controlled the decision in the case; (3) that the so-called "hearing" insofar as the respondents therein were concerned, terminated with the conclusion of respondents' evidence.

The decision of the Court of Appeals, if allowed to stand without clarification by this Court, is tantamount to an invitation to Post Office Department officials in their role of censors of all mail matter, to issue fraud orders without any hearing at all. Under such a theory the Post Office Department could issue a fraud order against a citizen without notice or a hearing on a slim piece of "evidence" contained in a Post Office Inspector's ex parte report and when the citizen woke up to the fact that his property had been confiscated, he would not be entitled to relief in the Federal Courts because there was some unopposed and uncontradicted evidence on which the order was based. He could thereby not be heard to complain (under the Court of Appeals theory) against the invasion of his rights under the due process of law provision of the Fifth Amendment to the Constitution. Such a theory could hardly be tenable under our system of Constitutional government based on a separation of powers. It is only by the invoking of the judicial power that such tendencies can be curbed and limited and the Constitutional guarantees and protection afforded the citizen.[5] Parenthetically, it is of course entirely proper to assume that no government official wilfully and deliberately sets out to artibrarily trump up charges and evidence, but subordinate administrative offi-

[5] "But for those who believe that administrative bodies should be subject to some jurisdictional check there remains the comfort of the doctrine of jurisdictional fact, narrow enough perhaps to avoid impeding the administrative process unduly; broad enough to give reassurance that the Courts are still at their posts, keeping administrative agencies within their jurisdiction." Larson—The Doctrine of "Constitutional Fact", 15 Temp. U. L. Q. 185 (1941).

cials are human beings just as are judges, some of whom are subject to personal prejudice and bias.

The instant case involves a somewhat analogous situation, for while notice was given and evidence-taking sessions were held at which the respondents therein appeared, yet the case to all intents and purposes was decided ex parte by the active prosecutor. The final judge, the Postmaster General, in the ordinary routine of his office signed a paper which the prosecutor had prepared, glanced at an ex parte recommendation, and did not bother to consider the evidence or the contentions of the respondents. Such a practice coupled with an entirely ex parte procedure during the intermediate and concluding steps, has apparently existed in the issuance of fraud orders for many years, for as was said in Part 12 of the Monograph of the Attorney General's Committee on Administrative Procedure relating to the Post Office Department (Senate Document No. 186, 76th Congress 3d Session, on page 31):

> "Upon approval by the chief attorney of the fraud section and by the Assistant Solicitor the decision is transmitted to the Solicitor and he may of course read the record if one is made and says that on occasion he does. Necessarily, however, he is dependent upon the report and material submitted by his subordinates."

The Monograph goes on to state on pages 31 and 32 that it is impossible to ascertain the extent of the Postmaster General's consideration of the case, but that it may even more safely be guessed that the consideration is ordinarily very limited and that examination of sample cases disclosed that usually the Postmaster General approves the decision on the same day or the day after it is submitted to him. A footnote on page 32 referred to the testimony of former Solicitor Donnelly of the Post Office Department in the case of *National Weeklies* v. *Farley* (District Court of the United States for the District of Columbia, 1939, unreported), wherein it was stated that the issuance of a fraud order was a routine matter with the Solicitor's office and that in

his experience as Solicitor he could not recall many cases where the Postmaster General ever read the record in a fraud case. (See also final report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Congress first session, pages 152 and 153, commenting on the difficulties faced by a respondent cited to show cause in a fraud order proceeding.

CONCLUSION.

The Court of Appeals has therefore declined to apply the doctrine of "Constitutional jurisdictional fact" as fixed by this Court in *Crowell* v. *Benson* and has, in effect, reversed this Court to that extent. Such a situation gives rise to the utmost confusion in attempting to apply the law of the land, as expressed by this Court, particularly in the District of Columbia, the seat of the Government where the greater part of Federal Administrative litigation arises.

If there is to be such a reversal, then it should come from this Court in unequivocable language so that it cannot be said that a standard of Federal law applies in the District of Columbia while an entirely different one applies to the rest of the United States. By the same token, if the Constitutional-right doctrine of *Crowell* v. *Benson* is still the law of the land then the Court of Appeals is in error and should be reversed.

Today, more than at any other time, a decision by this Coourt on the question presented by this case, is in the public interest, for with the growing encroachment of the executive authority on individual liberties and rights of property under the present emergency, the Post Office Department would be entirely free to use its power over the mails to destroy any and every type of business activity without due process of law unless some higher authority judicially fixes and determines the limit of that power under the Constitution of the United States.

The respondents' reference to the three other fraud order cases, in which certiorari was sought and denied during

the past three years, indicates the importance of the question and the pressing need for some determination by this Court as to whether any limit is to be placed on the extent to which Post Office officials may go in their confiscation (as distinguished from licensing or permissive) activities, without applying the standards of due process of law.

The record of this case unequivocally presents a factual basis for a final determination of the question.

For the reasons above set forth it is respectfully submitted that this petition should be granted and this case reviewed on certiorari by this Court.

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I hereby certify that the within petition is filed in good faith and not for purposes of delay.

Counsel for Petitioners.